No. 83-1864

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

RICHARD THORNBURGH, et al.,
Petitioners

v.

MARTIN NELSON, PAULA BUNTELE, and
THOMAS MOBLEY,
Respondents

BRIEF IN OPPOSITION OF NELSON, et al.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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QUESTION PRESENTED

Whether the district court made a correct factual determination when it held that providing respondents with reasonable accommodation would not be an "undue burden" on petitioners as that term is defined in the federal regulations which implement the Rehabilitation Act of 1973, 29 U.S.C. §794; 45 C.F.R. §84.12(c) (1983).

TABLE OF CONTENTS

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BRIEF OF NELSON, et al., IN OPPOSITION TO THE PETITION

Respondents Martin Nelson, Paula Buntele and Thomas Mobley respectfully request that the Court deny the petition for writ of certiorari seeking review of the Judgment Order of the United States Court of Appeals for the Third Circuit in this case.

Pursuant to the Honorable Ruggero J. Aldisert, the Court of Appeals issued its Judgment Order on March 6, 1984; the Order is not yet reported. The opinion of the district court is reported at 567 F.Supp. 369 (E.D. Pa. 1983).

STATEMENT OF THE FACTS

Respondents Nelson, Buntele and Mobley are blind. They are employed by respondents, the Pennsylvania Department of Public Welfare (DPW), and have been since the early 1970s. They have always received periodic, excellent evaluations. From the mid-1970s to the present, respondents have on their own employed part-time readers, and there is no dispute that with this assistance they have been "otherwise qualified" handicapped persons. Respondents pay approximately $2,400.00 yearly for readers from their net salaries of $21,000.00 per year. The remainder of their reader costs are paid by a Supplemental Security Income grant that is available to the blind.

DPW administers various federal programs. The district court found that petitioners dispense $4,310,000,000 to clients in those federal programs, most of which is from the federal government (Pet. App. 9a). In addition, DPW's budget includes $300,000,000 to administer these federal programs, of which $141,000,000 is from the federal government. (Pet. App. 9a). Approximately eighty percent (80%) of the administrative budget pays the salary and fringe benefits for DPW's 38,000 employees. (Pet. App. 9a). In addition to salaries, other administrative costs include $600,000 for travel reimbursements for county employees (Pet. App. 53a, n.20) and $15,318,000 for computer operations.

The district court found that the caseworkers' "central function . . . is the determination of the client's initial and continued eligibility for federal and state benefits." (Pet. App. 11a). This task involves interviewing clients; recording the results of the interviews on standardized forms; determining eligibility for benefits; and processing the claim for benefits through appropriate channels. (Pet. App. 11a-15a).

The skills which are essential to these activities are, *inter alia*, the ability to handle distraught clients and to assess accurately their needs; dedication and judgment; the ability to apply the facts of the client's situation to the general rules contained in the Manual; and the ability to work under pressure. (Pet. App. 17a). Helpful, but not essential, is the ability to read without assistance. (Pet. App. 17a).

The Court also found that DPW's previous efforts at accommodation were inadequate, but that with reasonable accommodation, respondents could perform their jobs as well as their sighted colleagues.[1] Based on the respondents' and petitioners' expert evidence proferred at trial, the district court found there were at least four available reasonable accommodations which could be used, either alone or in combination:

> 1. Adjusting DPW procedures, including brailling DPW forms, and requiring welfare clients to return the day after their interview to sign intake sheets (Pet. App. 26a);
>
> 2. Printing the DPW Manual in braille (Pet. App. 27a);
>
> 3. Purchasing technology, including the Versabraille (which petitioners' expert contended was the most effective and efficient machinery for the caseworker job) (Pet. App. 27a); and/or,

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1. In early 1980, respondent Nelson and Buntele filed administrative complaints with the Office of Civil Rights (OCR). In 1982, OCR determined that the petitioners' refusal to accommodate respondents violated Section 504 of the Rehabilitation Act of 1973.

4. Providing a reader. (Pet. App. 31a).[2]

After outlining this range of accommodations, the district court explicitly stated that "it will be up to the defendants to determine whether readers alone would be utilized or whether use would also be made of one or more of the other types of accommodations." (Pet. App. 34a and Order 74a).

The district court did not order any specific accommodation. Rather, the court outlined several accommodations which would have little long-range cost. For example, the court found that petitioners could restructure a respondent's job ("a blind IMW could gather client information one day and, on the following day, use the reader to prepare the form, with client verification on that day or soon thereafter"). (Pet. App. 31a-32a). Alternatively, petitioners could use existing clerical staff to "double as a reader" — "the most sensible method of accommodation." (Pet. App. 32a).

Notwithstanding these alternatives, petitioners decided on their own — not because the court had so ordered — to pay for readers. Petitioners chose the most expensive accommodation and did not attempt any other method to reduce the need for a reader.[3] Yet petitioners pivot their criticism of the district court's decision on these costs.

The district court balanced the cost of accommodations against "DPW's $300,000,000 administrative bud-

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2. The lower court found that any combination of the first three accommodations reduces substantially the amount of time a reader is necessary.

3. Petitioners are absolutely incorrect in arguing that the court imposed upon them the cost of readers; petitioners can choose what reasonable accommodations can effectively meet respondents' needs and can reduce expenditures for readers to nearly zero. The costs of readers, as the district court found, would be lowered if the petitioners modified their procedures even slightly. (Pet. App. 33a). Similarly, if the petitioners invested on a one-time basis in new technology, the need for readers will be reduced significantly. (Pet. App. 30a). Petitioners have not attempted any alternate accommodation to reduce the need for readers.

get [, its 38,000 employees,] . . . and the ease of adopting [the accommodations] without any disruption of DPW's services. . . . ," (Pet. App. 52a-53a). The court also recognized that the cost of a combination of alternate accommodations could be *de minimus*. Based on these factors, the court concluded that the accommodations did not impose any undue fiscal or administrative burden on petitioners, and thus, such accommodations were mandated by the federal regulations implementing §504. See *Southeastern Community College v. Davis*, 442 U.S. 397, 413 (1979) (recognizing accommodations may be required if they do not impose "undue financial and administrative burden on a State.").

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS CONSISTENT WITH *DAVIS* AND *DARRONE* AND IS A UNIQUE, FACTUALLY-DEPENDENT CASE THAT DOES NOT RAISE ANY IMPORTANT QUESTION WHICH WOULD JUSTIFY REVIEW BY THIS COURT

In *Southeastern College v. Davis, supra,* the issue was whether the plaintiff, "a hearing impaired applicant to a professional level nursing program was an 'otherwise qualified handicapped individual' with respect to that program." Because of the limitations imposed by her hearing impairment, Mrs. Davis could not perform all of the essential functions of a student in the College's nursing program. As the district court pointed out in its careful analysis,

> *Davis* presents an example of an insurmountable employment barrier, because the ability to hear is an essential requirement for a nurse. . . . (Pet. App. 45a),

and Mrs. Davis could not, even with accommodation, hear.

The court went on to distinguish the instant case from *Davis*. Here, the Court held, with inexpensive, in-

substantial accommodations, respondents cannot only perform all essential job functions, but they can do so as well as their non-handicapped colleagues — a fact not disputed by petitioners.

The district court merely applied the "undue burden" standard as it is defined in the federal regulations, 45 C.F.R. §84.12(c).[4] These regulations are the result of an extended rule-making process in which more than 300 written comments were reviewed and numerous meetings through the country were held. *See* 42 Fed. Reg. 22,676 (1977). In *Consolidated Rail Corporation v. Darrone*, ____U.S. ____, 104 S.Ct. 1248 (1948), this Court recently reviewed the federal regulations in the present case and unanimously ruled that they were consistent with Congress' intention that the Rehabilitation Act *expand* and *promote* the employment of the handicapped.[5] The lower court did no more than apply these federal regulations to the facts of the instant case.

The district court merely analyzed the size of petitioners' program (with respect to its budget and number of employees), the composition of petitioners' workforce, and the cost of accommodation. Balancing these factors, the lower court concluded that accommodations (whether readers, technology, job restructuring, or any combination of these or other modifications) did not amount to an undue burden on petitioners.[6]

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4. The Department of Justice filed an amici brief in both the district and circuit courts. In the district court, the government supported respondents and advised the court that the Department of Health and Human Services' regulations required petitioners to provide accommodations including reader services. In the circuit court, the government argued that the district court correctly interpreted the HHS regulations.

5. Petitioners failed to mention to this Court that the Honorable Ruggero Aldisert relied on *Darrone* in the Circuit's Judgment Order. (Pet. App. 3a).

6. Although there is a class of persons similarly situated to the respondents, to this date, none of these persons have requested *any* accommodation from petitioners. In fact, since Ms. Buntele is no longer working for DPW, the members of the class receiving accommodation are only Messrs. Mobley and Nelson.

Petitioners challenge the lower court's findings that the accommodations impose an undue financial or administrative burden on them. The writ of certiorari, in essence, questions the district court's factual findings with respect to these issues. The correctness of these factual findings are not important questions worthy of this Court's attention.

II. THE DISTRICT COURT'S DECISION DOES NOT CONFLICT WITH ANY OTHER COURT OF APPEALS

Petitioners cite three cases for the proposition that the district court's opinion conflicts with other circuits: *American Public Transit Association v. Lewis*, 665 F.2d 1272 (D.C. Cir. 1981); *Dopico v. Goldschmidt*, 687 F.2d 644 (2nd Cir. 1982); *Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority*, 718 F.2d 490 (1st Cir. 1983). These decisions do not conflict with the present case. Rather, they construe the mass transit accommodation, whereas the present regulations construe the HHS regulations. Therefore, the petitioners' circuit decisions deal with different administrative regulation, promulgated for a different factual situation than the regulations before this Court.

Moreover, these circuit decisions are consistent with this case. They held the use of designated percentage of expenditures for the handicapped was reasonable. The percentage of expenditures ordered by the courts in those cases is far in excess of what petitioners in the present case have been requested to expend on respondents.

III. THE ISSUE THAT A FEDERAL COURT MAY NOT ENJOIN STATES ON THE BASIS OF FEDERAL LAW WAS NOT RAISED OR BRIEFED IN THE LOWER COURTS AND PETITIONERS ARE INCORRECT THAT THE LOWER COURTS' ACTIONS WERE CONTRARY TO THE ELEVENTH AMENDMENT

In the district court, petitioners never raised the issue of whether a federal court may order prospective injunctive relief against the Department of Public Welfare for violation of the Rehabilitation Act.[7] Three days before the oral argument in the circuit, petitioners asked the circuit to reverse on this issue. The Honorable Ruggero Aldisert, in the circuit's Judgment Order, affirmed the district court and in a footnote wrote that "*Pennhurst State School and Hospital v. Halderman*, ____ U.S. ____ (52 USLW 4155, January 23, 1984), does not compel a contrary result. Here a federal statute is being construed; in *Pennhurst*, the Court was construing a state statute." (Pet. App. 3a).

There can be no doubt that federal courts have federal jurisdiction to enforce prospectively a federal statute. Petitioners' argument would deny a federal forum for aggrieved plaintiffs for the prospective enforcement of basic civil rights violations. No cases suggest petitioners' argument has any merit whatsoever.

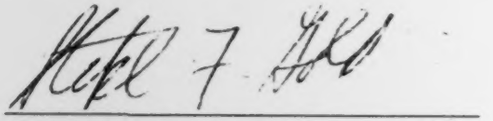
Moreover, the instant case is an inappropriate case to decide the issue. First, whether the Rehabilitation Act was passed under Section 5 of the Fourteenth Amendment or the spending power is very unclear. (Pet. App. 70a-71a). Second, petitioners are blatantly wrong when they state that the Rehabilitation Act only "induce[d] conduct" but did "not prohibit conduct; rather, [it] encourage[s] desired conduct. . . ." (Pet. App. 20-21). To the contrary, the Rehabilitation Act expressly prohibits conduct, to wit, discriminating against handicapped persons. Third, petitioners do not have "discretion" under the Rehabilitation Act to discriminate. Rather, under the supremacy clause, petitioners must comply with this mandatory law.

7. The district court did rule that the Eleventh Amendment barred plaintiffs' claim for damages. (Pet. App. 69a-71a).

CONCLUSION

For the above-stated reasons, respondents Nelson, Buntele and Mobley submit that the petition for writ of certiorari should be denied.

Respectfully submitted,



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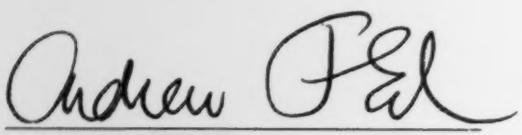

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